IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-262

DON ROBERT BARCLAY,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Don Robert Barclay, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Court of Criminal Appeals of Alabama rendered on the 20th day of February, 1979, which affirmed Petitioner's conviction for the crime of child molestation.

OPINIONS BELOW

The Opinion of the Supreme Court of Alabama denying Writ of Certiorari is reported at 368 So.2d 581. A copy of that Opinion appears in Appendix "A".

The Opinion of the Alabama Court of Criminal Appeals has been reported at 368 So.2d 579. A copy of said Opinion appears in Appendix "A".

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the thirtieth day of January, 1979, and is annexed hereto in Appendix "A", infra, Pages 1a-5a.

A timely Application for Rehearing to the Court of Criminal Appeals was denied, without opinion, on the twentieth day of February, 1979. The judgment thereon is annexed hereto in Appendix "A", infra, Page 6a.

A petition for Writ of Certiorari was filed within the time required by the laws of Alabama in the Supreme Court of Alabama, and this was denied on the twenty-third of March, 1979. The Judgment thereon is annexed in Appendix "A", infra, Page 7a.

This Court has jurisdiction by virtue of Rule 19 of the Rules of the Supreme Court of the United States which provide, in pertinent part, that "a review on writ

of certiorari . . . will be granted where a State court has decided a federal question of substance . . . in a way probably not in accordance with the applicable decisions of this Court".

QUESTIONS PRESENTED

I.

Whether the due process clause of the Fourteenth Amendment dictates that a defendant in a criminal case be allowed to attack the constitutionality of a Statute for the first time on appeal where he has not deliberately by-passed State procedures below. In this regard, Petitioner seeks to have controlling Alabama Supreme Court cases overruled which were followed in the decision of the Alabama Court of Criminal Appeals.

II.

Whether the Due Process Clause of the Fourteenth Amendment will permit a conviction to stand where the trial court fails to instruct the jury on lesser included offenses which are embraced in the indictment if there is any reasonable theory from the evidence which would support such an instruction.

CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

I.

Constitution of the United States, Amendment XIV, Section I;

"Section 1, . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

II.

U.S.C.S., Rules of Court, Supreme Court, Criminal Rule 19:

"A review on writ of certiorari . . . will be granted . . .:

(a) Where a state court has decided a federal question of substance . . . in a way probably not in accordance with applicable decisions of this Court."

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Autauga County, Alabama on a charge of child molestation and was sentenced to five years in the penitentiary.

The chief witness for the State was the complaining witness, a fourteen year old boy, who testified that he and the Defendant went into a building, consumed alcohol, and that the Defendant then sexually molested him. He stated that he ran out of the building, jumped over a chicken wire fence, but the Defendant told him to get back in his automobile, which he did. The Defendant then bought the alleged victim some chewing gum and then drove him to where his mother was

to pick him up. The alleged victim was never taken to a doctor. The Defendant had no prior record and was an employee of the Summer Youth Program, of which the alleged victim was a participant.

The wife of the Defendant, Susan Barclay, testified that on the day in question her husband passed their house and stopped at his mother's house; that her husband got out of the car and Marlin, the alleged victim, got out of the car too; that her husband then turned around and came back to their house and told her that the Gentry boy was drunk and for her to fix some coffee to sober him up. She saw the boy "wandering down the road towards Tuscaloosa".

Although there was testimony by the alleged victim that the Defendant showed him a vibrator in the building in question, the testimony was further to the effect that there was no electricity in the building in question and no outlets for electricity; that it was necessary for the officers to use a flashlight to see anything inside the building.

A Sheriff's Deputy testified that on the date in question he saw the alleged victim and he appeared to be drunk. The same Deputy testified that the Defendant was not drunk. Several witnesses testified as to the Defendant's good reputation in the community in which he lived.

REASONS FOR GRANTING THE WRIT

I.

On appeal to the Alabama Court of Criminal Appeals, Petitioner contended that Title 13, §13-1-113, 1975 Code of Alabama, was vague and uncertain and thus violative of the Fourteenth Amendment to the United States Constitution. That Statute, in pertinent part, reads as follows:

> "It shall be unlawful for any person to take or attempt to take any *immoral, improper or indecent liberties* with any child of either sex under the age of sixteen years with intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, . . . or to commit, or attempt to commit any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with an intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child. . .". (emphasis added)

The Alabama Court of Criminal Appeals has construed this Statute to mean that it may be violated without actual physical contact with the child. *Slagle* v. *State*, 39 Ala. App. 691, 108 So.2d 180.

The Alabama Court of Criminal Appeals refused to consider the constitutionality *vel non* of the Statute in

question on the ground that Petitioner's then counsel had not raised this issue at the trial level. Petitioner contends that he did not intentionally relinquish or abandon a known right or privilege in this regard, and that he should not be shackled by the fact that his then attorney did not raise this issue below.

Issues of great magnitude in criminal cases are oftentimes considered on appeal without these matters having been raised below. In recent years, *Henry* v. *Mississippi*, 379 U.S. 443, has laid the predicate for many appellate courts to require less strict adherence to state procedural requirements even when the defense has had ample opportunity to comply. In *People* v. *McPherson*, 21 Mich. App. 385, 175 N.W. 2d 828, decided in light of *Henry*, the defendant's failure to object before trial to his reprosecution on a higher offense was held not to preclude the appellate court's consideration of his double jeopardy claim.

It would seem only logical that the appellate courts in Alabama should be willing to notice a matter of constitutional dimension which is raised for the first time on appeal, at least where there is no indication of a deliberate by-pass below, since the issue may eventually have to be considered on a collateral attack as federal courts will permit a state defendant to raise constitutional issues for the first time in a federal proceeding, provided he did not deliberately by-pass state procedures. *Faye* v. *Noia*, 372 U.S. 391. In *Alexander* v. *U.S.*, 390 F.2d 101 (5th Cir. 1968), for example, the appellant

challenged the admissibility of evidence seized by postal inspectors although the specific issue of "what is a postal inspector's authority in this regard" was never advanced by trial counsel. The appeals court, however, held that this was a basic constitutional question reviewable under the Plain Error Rule. Rule 52(b), Federal Rules of Criminal Procedure. For additional case citations, see Footnote No. 3 at Page 103 of this opinion. Similarly, in *State* v. *Carufel*, 263 Atl. 2d 686 (R. I. 1970), the Rhode Island court held that it would review on appeal a Fourth Amendment objection that was not considered by the trial judge because defense counsel failed to fully advise the trial court of the scope of his objections. In *State* v. *Knoblock*, 44 Wisc. 2d 130, 170 N.W. 2d 781, the Wisconsin Court held that an objection based upon the constitutional acquisition of evidence would be considered on appeal despite the absence of any objection below, if the failure to object was not the product of a deliberate by-pass.

Regarding the notion of "deliberate by-passing", it should be noted that while the *Faye* opinion did not explore at length what constitutes a "deliberate by-pass", it did stress that the determination of that issue should be in accord with the "classic definition of waiver — 'an intentional relinquishment or abandonment of a known right or privilege' ". *Faye* also noted that the by-pass must reflect the "considered choice of the petitioner. . . . A choice made by counsel not participated in by petitioner does not automatically bar relief". Several variables should come into play when determining

whether or not there has been a deliberate by-pass or waiver including (1) whether the state would be prejudiced by the issue being raised for the first time on appeal; (2) whether the defendant participated in the "by-pass" below; (3) the fundamental nature of the right involved; (4) and also the severity of the penalty imposed should have a bearing on the court's willingness to consider an issue not raised below. It is to be noted that Petitioner received the maximum sentence in the instant case, i.e., five years in the penitentiary.

II.

Petitioner argued below that the jury should have been instructed by the Trial Judge as to the lesser included offenses of "inticing child to enter vehicle, house, etc " and "contributing to the delinquency of a minor". Petitioner's contention is that although trial counsel did not specifically request such instructions, the Trial Judge had a responsibility to ensure that certain essential instructions were given. Certain basic instructions are essential to the fair determination of a case by a jury and the notion of waiver should not be employed to bar reversal if a defendant has been convicted in the absence of these instructions. For example, it has never been held that defense counsel must specifically request an instruction with regard to the burden of proof. Nor has it been held that a specific instruction must be requested with regard to the elements of the offense charged. Therefore, is it asking too much for the trial judge to send all verdict possibilities to the jury without regard to what the parties

prefer? The case of *State* v. *Hicks*, 241 N.C. 156, 84 S.E. 2d 545, speaks to this issue, where we find this language:

> "If the evidence warrants such finding, the trial judge must submit that phase of the case to the jury whether requested to do so or not."

Hicks also stands for the proposition that the fact that the defendant was convicted of a more serious crime does not cure the error in failing to instruct the jury as to the lesser included offenses embraced in the indictment, although not specifically requested to do so. See also, *State* v. *Williams*, 185 N.C. 685, 116 S.E. 736.

The difficulty with a contrary point of view is that it overlooks the proper role of the Court. Suppose defense counsel, as a tactical maneuver, deliberately goes for all or nothing and does not request any instructions as to lesser included offenses. Should the trial judge refuse to charge on lesser included offenses because defense counsel would prefer that he did not? A number of States reject any requirement that the defendant request any such instructions if the indictment includes a lesser offense and the evidence will support a conviction of such an offense, holding that an instruction thereon must be given and failure to do so is prejudice to the convicted defendant and entitles him to a new trial. For example, see *People* v. *Dallarico*, 140 Ca.App.2d 233, 295 P.2d 76; *Giles* v. *U.S.*, 144 F.2d 860 (9th Cir. 1944); *State* v. *Hicks*, supra; *Tarter* v. *State*, 352 P.2d 596.

In the instant case, there was evidence that the Defendant enticed the minor into a house or shed by giving or offering him alcohol. Therefore, there was clearly evidence which would support an instruction as to "enticing child to enter vehicle, house, etc.".

As a matter of law, these lesser included offenses are embraced in the indictment and as a matter of law the Trial Judge should have instructed the jury as to these lesser included offenses.

CONCLUSION

Based on the foregoing contentions, Petitioner contends that he was not given a fair trial and consequently his right to due process of law under the Fourteenth Amendment to the U.S. Constitution has been violated. Petitioner respectfully urges this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing have been served upon the Attorney General of the State of Alabama, Mr. Charles Graddick, by mailing same to him on this the ____day of August, 1979.

_____

Attorney for Petitioner

APPENDIX "A"

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

3 Div. 926

Don Robert Barclay

versus

State

Appeal from Autauga Circuit Court

Filed: Jan. 30, 1979

BOWEN, JUDGE

The appellant was indicted and convicted for the offense of child molestation as defined in Section 13-1-113, Code of Alabama 1975. Sentence was fixed at the maximum term of five years' imprisonment.

Sufficient evidence was introduced to authorize the jury to find that the appellant, under the guise of helping fourteen year old Marlin, took Marlin to a deserted building, forced him to drink vodka, attempted to make Marlin perform fellatio and committed an act of

sodomy upon the youth. The appellant admitted being with Marlin but disclaimed any improper conduct.

I

Initially the appellant alleges that the trial judge erred in failing to charge the jury that Section 13-1-114, Ala. Code 1975 (enticing a child to enter a vehicle, house, etc., for immoral purposes), and Section 12-15-13, Ala. Code 1975 (contributing to the delinquency of a minor) are lesser included offenses of Section 13-1-113, Ala. Code 1975 (child molestation).

At the close of the court's oral charge defense counsel announced "satisfied". The record contains no written requested charges and there is no indication that any requested charge was refused. In the absence of an objection or the refusal of a requested instruction there is nothing for this court to consider. *Ingram* v. *State*, 48 Ala.App. 193, 263 So.2d 179, cert. denied, 288 Ala. 743, 263 So.2d 181 (1972); *Ross* v. *State*, 16 Ala.App. 393, 78 So. 309 (1918).

II

Inasmuch as the constitutionality of the statute under which the appellant was indicted and convicted was not presented or contested in the trial court by any means, that question is not due to be decided on appeal. This court will not consider on appeal any constitutional questions not raised below. *Steele* v. *State*, 289 Ala. 186, 266 So.2d 746 (1972). However we note that the

present statute has withstood at least one attack upon its constitutionality. *Blocker* v. *State*, 40 Ala.App. 658, 120 So.2d 924 (1960).

III

The appellant also challenges the lawfulness of the search of the building where Marlin was sexually assaulted and various items of physical evidence were seized. The State's position is based upon a written consent to search form executed by the appellant and by the fact that the appellant's wife voluntarily unlocked the door for them. Under the State's evidence the appellant consented to the search of the deserted building only after he had talked to his wife. The appellant presented contradictory evidence on this point and maintains that a consent to search is *per se* invalid and the State failed to prove that the consent was voluntarily and intelligently given.

Proper consent may constitute a waiver of Fourth Amendment rights, *Zap* v. *United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), and makes a search warrant wholly unnecessary. *Toston* v. *State*, 333 So.2d 161 (Ala.Cr.App. 1976). The voluntariness of consent to search is a question of fact to be determined from the totality of all the circumstances. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States* v. *Smith*, 543 F.2d 1141 (5th Cir. 1976).

The failure to inform the accused of his right to refuse is a factor to consider in determining voluntariness but is not to be given controlling significance. *United States* v. *Smith*, 543 F.2d 1141, 1143 (5th Cir. 1976). "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. The burden of proving that the consent was, in fact, freely and voluntarily given rests upon the prosecution. *Bumper* v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). "The State must prove that there was no duress or coercion, express or implied. The consent must be unequivocal and specific, and freely and intelligently given. There must be clear and positive testimony." *Hardy* v. *State*, 53 Ala.App. 75, 78, 297 So.2d 399 (1974).

A "permission for search of premises and residence without search warrant" was signed by the appellant. That permission, in pertinent part, reads:

> "Without there having been any threat or pressure, coercion or duress of any kind, and having been advised of my constitutional rights, and having waived said rights, I do hereby give my consent or permission for officers: H. A. Simpson & Vernon Hamn
>
> Address: 612 W Fourth
> White house next to above address

> of the Autauga County Sheriff's Department to search my premises and residence and to seize and carry away any such items deemed necessary by above officers.
>
> /s/ Don R. Barclay
> Don R. Barclay"

An examination of the totality of the circumstances reveals that the evidence fully established that the appellant's consent to search was voluntarily given after being advised of his constitutional rights, despite the contention that the consent was involuntary because the appellant did not know he had the right to refuse.

We have searched the record for error prejudicial to the accused. In its absence, we affirm the judgment of the trial court.

AFFIRMED.

All Judges Concur.

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

3rd Div. 926, AUTAUGA Circuit Court

DON ROBERT BARCLAY,
Appellant,

versus Cir.Ct. #CC 77-164

THE STATE,
Appellee.

Dear Sir: This is to advise you that on Feb. 20, 1979, the Court of Criminal Appeals announced decision of: application for rehearing overruled in the above stated case. No opinion.

Yours truly,
MOLLIE JORDAN, CLERK

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

March 23, 1979

Re: 78-315
EX PARTE: DON ROBERT BARCLAY
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

Re: DON ROBERT BARCLAY,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Petition for Writ of Certiorari denied. No opinion.

/s/ J. O. SENTELL,
Clerk, Supreme Court
of Alabama